No. 17-204

IN THE
Supreme Court of the United States

APPLE INC.,
Petitioner,

v.

ROBERT PEPPER, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which construes § 4 of the Clayton Act to exclude damages claims by "indirect purchasers" two or more steps away in a vertical supply chain from the alleged monopolist, bars owners of Apple-manufactured iPhones who purchased aftermarket software applications ("apps") from Apple through its App Store from recovering damages from Apple for monopolizing the market for such apps.

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INTRODUCTION

Respondents are Apple iPhone owners who purchased iPhone applications ("apps") from petitioner Apple through its App Store. Respondents cannot purchase apps through any other means, because Apple designs, builds, and ships iPhones with technological limitations that prevent owners from buying or obtaining apps anywhere else. As a result, no competitors exist. Apple's technologically enforced monopoly of the retail aftermarket for iPhone apps drives app prices higher than they would be in a competitive market. Respondents pay the monopoly prices for apps directly to Apple through its App Store. Those facts make respondents direct purchasers of iPhone apps who can sue Apple for damages under § 4 of the Clayton Act and the bright-line rule this Court adopted in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Illinois Brick bars § 4 damages claims where a plaintiff sues a defendant two or more steps removed in a distribution chain, when the monopoly overcharge causes damage first to an intermediary and only then to the plaintiff. *See id.* at 737 (rule bars claims where goods flow "from direct purchasers to middlemen to ultimate consumers"). Here, respondents purchase apps directly from Apple through Apple's App Store and pay the overcharge directly to Apple. The developers that create the apps do not and cannot sell directly to iPhone owners. Through technological barriers and threats to void warranties, Apple prevents iPhone owners from purchasing apps through any channel other than Apple and the Apple App Store. Developers receive money for iPhone apps only from Apple and only after consumers make their purchases.

Apple's attempts to invoke *Illinois Brick* depart from the allegations of the complaint in two important

ways. Neither departure is appropriate on a motion to dismiss, and neither would make a legal difference even if valid. *First*, Apple contends that it has monopolized the market only for app-distribution services, not for apps themselves, and that it sells app-distribution services only to developers. But respondents properly alleged that Apple acts as a monopolist in selling apps to iPhone owners, which no one else can do. Further, even if this Court were to accept Apple's invitation to recharacterize the complaint as alleging a monopoly on distribution services rather than a monopoly on apps, it would not matter because Apple sells services to consumers as well.

Second, Apple contends that developers set app prices and that Apple is merely their agent in selling apps to iPhone owners. That is not true – Apple controls which developers can sell apps, which apps can be sold, and what prices developers can charge. It exercises that control by insisting that every paid app be priced in dollar increments at $0.99, $1.99, $2.99, and so forth. Even if the app developers functionally controlled their app pricing, that would not defeat respondents' cause of action. Respondents still deal directly with Apple, pay Apple for the apps, and sustain damages directly from Apple's monopoly power.

Contrary to Apple's claims, this case presents no risk of duplicative damages. If the developers that create software apps could seek antitrust damages from Apple, they would be "differently situated plaintiffs" seeking remedies for "different injuries in distinct markets." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002) (Wood, J.). As suppliers of apps – not purchasers – they would be suing Apple as a monopsonist rather than as a monopolist, and their claims presumably would rest on the

allegation that Apple's restraints cause them to earn lower profits (because of lower prices received, reduced sales, or both) than they could obtain in a market not dominated by a single retailer. So calculated, their antitrust damages could be negative or zero even though iPhone owners' damages were positive – showing that app developer damages are not "passed on" to respondents.

Finally, Apple's misapplication of *Illinois Brick* would undermine the purpose of that rule, which promotes the "vigorous enforcement" of § 4's treble-damages remedy. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990). This is not a case where the iPhone owners' suit would decrease the incentives of a more suitable group of private plaintiffs to act as enforcers – the iPhone owners are the best situated to seek damages from Apple because they have been directly damaged by its unique business model. Settled law recognizes them as appropriate plaintiffs.

STATEMENT

A. The iPhone, Apps, and the App Store

1. The iPhone is a groundbreaking product that has met with great commercial success. It combines attributes of a cellular phone, handheld computer, music player, video player, camera, and other devices. After purchasing an iPhone that Apple has manufactured and loaded with its proprietary iOS software, the iPhone's owner deploys the device's capabilities by using software applications ("apps") that are loaded onto the iPhone and enable it to do various things such as communicate with friends; view documents, pictures, and video; listen to music; shop for products and services; play games; and engage in a host of other activities. *See Riley v. California*, 134 S. Ct. 2473, 2490 (2014) ("[t]here are apps . . . for every conceivable

hobby or pastime"). A small number of apps are loaded onto the iPhone at the time of its initial purchase, but the vast majority must be obtained separately in later ("aftermarket") transactions – some for free, and others for payment.[1]

To purchase apps in the aftermarket, iPhone owners have only one option: they must go to Apple's App Store. From the iPhone owner's perspective, the App Store is itself an app on the iPhone that Apple created and maintains for the purpose of selling other apps. That digital storefront is backed by an administrative and support structure that includes employees who review apps and servers that store them, all managed and controlled by Apple. App. 51a (¶ 39). Apple actively manages the App Store's inventory, employing "editors" who "handpick" featured apps for promotion by Apple in the App Store and who offer "perspectives on what's new and next in the world of apps."[2] Apple at all times retains the "sole discretion" to decide what apps it will and will not sell through the App Store.[3]

After using the App Store to search or browse for apps, iPhone owners who decide to make a purchase then "buy [those] apps from the App Store" by paying

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[1] An "aftermarket" is generally defined as a "derivative market" for goods "that must be used for the proper functioning of some primary good" and that "are typically purchased in a later transaction than the purchase of the underlying primary good." IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 564b, at 421 (4th ed. 2014) ("Areeda & Hovenkamp").

[2] Apple, *App Store*, https://www.apple.com/ios/app-store/ (last visited Sept. 24, 2018).

[3] Apple, *iPhone Developer Program License Agreement* § 3.2(f) (Jan. 22, 2010 version), https://www.eff.org/files/20100127_iphone_dev_agr.pdf (last visited Sept. 24, 2018) ("Apple Developer Terms"); *see also id.* § 6.2; *cf.* Pet. Br. 36 n.15 (copies of the Apple Developer Terms "are widely available on the internet").

Apple the app's list price using an "Apple ID" account, which is usually linked to a credit card for payment purposes.[4] After receiving payment, Apple permits the owner to download the app – that is, to copy the digital code that constitutes a selected app from Apple's server to the user's iPhone. Should customers need the app again, it remains available to them through the App Store; and consumers who encounter billing issues – for example, who see "an app charge that [they] don't recognize" or who want to "change[] or cancel" an in-app subscription – go directly to Apple. App Store Support Page.

Apple presents the App Store to iPhone owners as the sole way they can "buy, get, license, rent or subscribe to media, [apps], and other in-app services."[5] In order to access the App Store, iPhone owners must agree to the Apple Services Terms, which obligate them to pay charges to Apple for "Content" (including apps), waive certain remedies against Apple, agree to a standard end-user license agreement, allow Apple to modify the Apple Services Terms at any time, and agree to allow Apple to "modify, suspend, or discontinue . . . any . . . Content" – including, among other things, a user's access to any purchased apps – "with or without notice" and with no liability for doing so. Apple Services Terms § J. Among additional terms to which an owner must agree is a recitation by Apple

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[4] Apple, *Download apps and games using the App Store*, https://support.apple.com/en-us/HT204266 (last visited Sept. 24, 2018) ("App Store Support Page"); *see also* App. 52a (¶ 41).

[5] Apple, *Apple Media Services Terms and Conditions* § A, https://www.apple.com/legal/internet-services/itunes/us/terms.html (last visited Sept. 24, 2018) ("Apple Services Terms"). Other Services include Apple's "iTunes Store, . . . Apple Books, Apple Music, and Apple News." *Id.*

that "Apple acts as an agent for App Providers in providing the App Store and is not a party to the sales contract or user agreement between [the owner] and the App Provider." *Id.* § G. Yet the owner must simultaneously agree that Apple is a "third-party beneficiary of" the license agreement for the app "and may therefore enforce such agreement." *Id.*

2. Apple designs and programs its iPhone (through the iOS operating system) so that an iPhone owner can purchase aftermarket apps only through Apple's proprietary App Store. That restriction is enforced primarily through technological means: the iPhone's software "foreclose[s] iPhone consumers from buying software from any source other than Apple." App. 42a (¶ 7); *see* Pet. Br. 7 ("iPhones will only download" apps from the App Store). Apple also reinforces its restriction by threatening customers with adverse contractual consequences if they bypass Apple's technological barriers. An owner who successfully modifies an iPhone's software so as to install apps from non-Apple sources – often referred to as "jailbreaking" the phone – risks voiding the phone's warranty. *See* App. 3a.[6]

Apple's intentionally closed system prevents competition in the aftermarket for iPhone apps. iPhone owners who want to unlock the range of functions on their iPhone have no choice but to shop for apps in the App Store, which enables the App Store to collect

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[6] *See also* Kif Leswing, *Apple has strong words for anyone who wants to 'jailbreak' their iPhone to run unauthorized apps*, Bus. Insider (June 23, 2018) ("Apple also says that a jailbroken device can be denied service at Apple stores."), https://www.businessinsider.com/apple-jailbreak-iphone-warning2018-6; Apple Support, *Unauthorized modification of iOS can cause security vulnerabilities, instability, shortened battery life, and other issues*, https://support.apple.com/en-us/HT201954 (last visited Sept. 18, 2018).

a higher price per app than if Apple were forced to entice app seekers in a competitive market. *See* App. 52a-55a (¶¶ 41-43, 48-49).

3. Because consumers with iPhones can purchase apps only through Apple's App Store, developers wishing to sell apps to iPhone owners must reach customers by having Apple sell their apps through the App Store. For access to the App Store, developers pay Apple $99 per year. *See* App. 51a (¶ 38). In addition, every time Apple sells an app through the App Store, it collects the full price from the purchasing iPhone owner, keeps 30%, and pays the remaining 70% to the developer. *See* App. 52a (¶ 41).

Currently, Apple permits developers to select a retail price that Apple will charge owners for the developers' apps, but only from a limited range of prices. The price must end in "99 cents," Pet. Br. 9, meaning that developers are required to increase prices in one-dollar increments ($0.99, $1.99, $2.99, and so forth). As a practical matter, that allows only for very blunt price adjustments because "[t]he vast majority of [paid] apps are priced at 99 cents."[7] Thus, a developer wishing to set a price lower than the Apple-mandated minimum price point must give away the app for free; one wishing to price above that point must at least double the 99-cent price.

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[7] Tim Kridel, *Pricing Strategies for Your App*, Digital Innovation Gazette, https://www.digitalinnovationgazette.com/dollars-and-distribution/pricing-strategies-for-your-app/index.php (last visited Sept. 18, 2018); *see also* Tracy-Gene G. Durkin, *Another way to look at software protection*, 259 Managing Intell. Prop. 10 (May 2016) (as of June 2015, the average price of an app in the Apple App Store was $1.16), *available at* https://www.sternekessler.com/news-insights/publications/another-way-look-software-protection.

Moreover, app developers' limited pricing discretion is revocable. Apple's agreement with developers provides that the governing terms may change "at any time" and that failure to agree to updated terms will cause a developer's "use of the Apple Software and any services [to] be suspended or terminated by Apple." Apple Developer Terms § 4. Beyond that, Apple maintains control over apps it sells to device owners by reserving the right to "cease distribution" or "revoke the digital certificate" of any app – that is, remotely render the app unusable – "at any time" if Apple believes "such action is prudent." *Id.* § 8.

B. Procedural History

1. On December 29, 2011, respondents filed a complaint alleging that Apple had violated and continues to violate § 2 of the Sherman Act. The complaint was consolidated with others and amended several times. On September 5, 2013, respondents filed the operative version of the complaint, in which they seek to represent a class of iPhone owners who paid Apple for apps from December 2007 to the present. *See* App. 40a-64a.

Respondents allege that Apple conspired to, and successfully did, "monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits." App. 41a (¶ 3); *see also, e.g.*, App. 44a (¶ 12) (describing "Apple's unlawful monopolization of the iPhone applications aftermarket"); App. 48a-49a (¶ 29) (similar). They define the relevant market as the "aftermarket for iPhone applications." App. 58a-59a (¶ 65).[8]

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[8] Apple asserts in its brief (at 5) that respondents "do not allege that Apple monopolized *apps*." *See also* U.S. Br. 9 (picking up the same theme and describing "the *app-distribution services* that Apple allegedly monopolized"). That characterization is incorrect. *See also infra* pp. 29-31.

Respondents further allege that, "as a result" of Apple's "monopolistic conduct," they "have been forced to pay supracompetitive prices to Apple." App. 55a (¶ 49); *see also* App. 42a (¶¶ 4, 7) (alleging that "Apple . . . charge[s] and collect[s] a supracompetitive 30% fee from iPhone consumers"); App. 54a-55a (¶ 48) (describing the lower prices that would prevail "[i]n a competitive environment"). In a competitive market, iPhone owners would be able to "choose between Apple's high-priced App Store and less costly alternatives." App. 55a (¶¶ 49-50); *see also* App. 61a (¶ 73) (respondents have been "deprived of lower cost alternatives for apps" and "subjected to a lower output and supply of apps").

In addition, respondents also allege that Apple obtained and sustains monopoly control over the aftermarket for apps through direct interactions with respondents that prevent them from buying apps from anyone else. Those interactions include Apple's "modifi[cation]" of the operating system iOS "to be a 'closed' system by installing 'security measures' or 'program locks' designed to prevent iPhone consumers from installing and running apps that were not sold or approved by Apple." App. 49a (¶ 30); *see also* App. 50a-51a (¶¶ 34, 36). Apple also threatens its iPhone customers that using any apps not sold by Apple would "nullify Apple's iPhone warranty." App. 50a (¶ 34); *see also* App. 51a-53a (¶¶ 36, 42-43).

Respondents seek both treble damages for their injuries caused by Apple's past violations of the federal antitrust laws and an injunction prohibiting Apple from "monopolizing or attempting to monopolize the iPhone applications aftermarket." App. 63a.

2. Apple moved to dismiss the operative complaint, and the district court granted the motion under

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). App. 23a-37a. The court held that the monopolization complaint did not fall within a Ninth Circuit exception to the *Illinois Brick* rule for "price fixing" and, further, that the complaint alleged only supracompetitive prices "passed-on to consumers by independent software developers." App. 36a-37a. The district court dismissed the complaint in its entirety. App. 37a.

3. A unanimous panel of the Ninth Circuit reversed. The panel first traced the history of the *Illinois Brick* rule, observing that every time this Court has applied that rule "the basic structure" of the transaction at issue has been "the same." App. 16a. "In all three cases, the consumer was an indirect purchaser" from the alleged violator "who sold or leased the product to the intermediary" in the supply chain. App. 16a-17a; *see Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, *supra*; *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). Applying that "straightforward" rule, the panel concluded that respondents could recover damages from Apple because Apple "sell[s] [apps] directly to purchasers through its App Store." App. 18a, 21a.

The panel disagreed with *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998). There, concertgoers who had no prior relationship with Ticketmaster "bought concert tickets directly from Ticketmaster," but the Eighth Circuit deemed them "indirect" purchasers and denied them the right to sue. App. 18a-19a. The *Ticketmaster* majority held that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." 140 F.3d at 1169. Agreeing with Judge Arnold's dissent in *Ticketmaster*, the

Ninth Circuit rejected that "antecedent transaction" test as having "no basis" in *Illinois Brick*. App. 19a.

The court held that Apple's direct sales to respondents were more important than Apple's "ownership of the apps" it was selling, "the formalities of payment or bookkeeping arrangements," or how the "ultimate" retail price is determined. App. 20a-21a. It also declined to address whether app developers also could bring antitrust claims. App. 20a. The panel instead found it dispositive that consumers and Apple occupy adjacent positions in the supply chain. *See id.*; *see also Illinois Brick*, 431 U.S. at 737 (claims barred where goods go "from direct purchasers to middlemen to ultimate consumers"). Drawing an analogy between Apple's App Store and the supply chain for tangible consumer goods – in which manufacturers sell to wholesalers, which sell to distributors, which sell to consumers – the panel reasoned that Apple occupies the position of the "distributor," selling manufactured apps "directly to purchasers." App. 21a. Those purchasers – the iPhone owners – accordingly have a cause of action against Apple for monopolizing the market and driving up prices.[9]

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[9] The Ninth Circuit did not reach respondents' alternative argument, *see* Resp. C.A. Br. 53-54, that their claims for injunctive relief would survive even if Apple prevailed under *Illinois Brick*.

SUMMARY OF ARGUMENT

I. Section 4 of the Clayton Act authorizes a private suit for damages by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). This Court has held that, as applied to purchasers of goods or services, that broad language authorizes suit only by direct purchasers – those who buy products or services directly from a monopolist or cartel. Indirect purchasers, who are two or more steps removed from the violator in a distribution chain, cannot sue even though they may suffer harm from the violation. In this case, respondents purchase apps directly from Apple through Apple's App Store; they claim that Apple violated the Sherman Act by monopolizing the retail market for apps; and they assert that Apple's unlawful conduct is responsible for the overcharges they have suffered. Accordingly, they can seek damages from Apple under the Clayton Act.

A.1. This Court has drawn a bright-line rule: those who purchase directly from an antitrust violator can seek damages, and those who purchase indirectly cannot. The first case in the trilogy that establishes that rule is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *Hanover Shoe* involved a shoe manufacturer that sued a monopolist of shoemaking equipment. The monopolist argued that the manufacturer had no damages because it passed the cost of the equipment on to its customers – if the equipment had cost less, then shoes also would have cost less, and the plaintiff would have been no better off. This Court rejected the monopolist's "passing-on defense" as inconsistent with precedent and likely to overcomplicate the litigation of antitrust cases. It therefore held that the manufacturer could sue for the

full overcharge that resulted from the monopolist's anticompetitive practices.

2. The second case is *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which gave the direct-purchaser rule its name. *Illinois Brick* was a price-fixing suit by Illinois against makers of concrete blocks. Illinois did not buy blocks directly, but paid for construction projects built by general contractors that hired masonry subcontractors that bought the (allegedly price-fixed) blocks. This Court refused to let Illinois recover damages for the price-fixing, deeming it too complex to determine how the price of the building projects had been affected by the increased price of the blocks and expressing concern that spreading damages over the entire distribution chain would decrease the incentive of plaintiffs to bring private antitrust actions.

3. The third and final direct-purchaser case from this Court is *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), a price-fixing suit by Kansas against natural-gas suppliers. The suppliers sold to regulated utilities, which sold to consumers. Kansas (on behalf of the consumers) argued that they could sue the suppliers because the utilities, being regulated, passed along the entire cost increase. This Court rejected that argument and refused to make exceptions to the direct-purchaser rule on a case-by-case or even industry-by-industry basis. To do so, the Court explained, would sacrifice the benefits of clarity and administrability by turning every large antitrust case into a fact-intensive dispute about whether the economic reasons for the direct-purchaser rule were present or absent.

B.1. iPhone owners purchase apps directly from Apple and therefore can seek damages from Apple under the direct-purchaser rule. The complaint alleges

that Apple has monopolized the market for apps at the retail level. There is no intermediary between the iPhone owners and Apple. To the contrary, Apple has gone to great lengths to ensure that no one *but* Apple can sell apps to iPhone owners. And Apple even has conceded in other litigation (involving Apple Books, which for present purposes is materially identical to the App Store) that iPhone and other device owners are direct (not indirect) purchasers of content from Apple. Under the bright-line rule established by *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*, those facts answer the question presented.

2. Apple cannot avoid that conclusion by arguing that it monopolizes app-distribution services, not apps. The monopoly alleged in the complaint is a monopoly on apps, and respondents – as plaintiffs – are the masters of the complaint. Further, even if the complaint alleged a monopoly on distribution services (which it does not), Apple provides distribution services directly to iPhone owners, and so iPhone owners still could sue Apple for damages.

Apple also cannot prevail by arguing that it sells apps only as an agent for the developers. Agency is about control, and the complaint properly alleges that Apple (not the developers) controls all aspects of the sale of apps through the App Store, including the prices at and terms on which apps are sold. Apple's purported agency status stems solely from language that it wrote and imposed as a mandatory condition on use of the App Store by iPhone owners or app developers. A monopolist cannot use its market power to make all other market participants sign admissions that it is an agent and then use the "agency" label to avoid a remedy for its anticompetitive conduct.

Similarly, Apple's contention that app developers have discretion to set the prices charged for their apps does not shield Apple from a claim for damages. Apple both has and exercises control over the prices that developers set, most conspicuously through its policy of requiring that all prices in the App Store must "end in 99 cents." That 99-cent price rule both impedes price competition in the market and, more broadly, illustrates that developers have only limited influence over the prices consumers pay Apple. Apple retains the contractual right to change unilaterally and at any time the terms of its agreements with iPhone owners and app developers; it could decide tomorrow that it wants to set every price in the App Store, and no other market participant could do anything in response except for ceasing to purchase or supply iPhone apps.

Apple also cannot prevail by relying on *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998). That case was an action by concertgoers who claimed that Ticketmaster had monopolized the market for ticket-distribution services. The Eighth Circuit held that, because Ticketmaster's ability to charge supra-competitive prices stemmed from an "antecedent transaction" with concert venues rather than a pre-existing relationship between Ticketmaster and the concertgoers, the venues rather than the concertgoers were the direct purchasers of Ticketmaster's services. That antecedent-transaction test cannot be squared with this Court's direct-purchaser rule. And, even taken at face value, that test would make iPhone owners (not app developers) the direct purchasers here, because an "antecedent transaction" between iPhone owners and Apple – which blocks any other distribution channel – creates Apple's market power.

II. The considerations that led this Court to adopt the bright-line *Illinois Brick* rule fully support the result the court of appeals reached below.

A.1. The iPhone owners' action does not seek damages that would duplicate or overlap with any damages that might be sought by app developers, if such a suit ever were or could be brought. Despite Apple's self-protective characterization of the transaction in its contracts, a developer would be suing Apple as a supplier of apps to the Apple App Store, not as a purchaser of app-distribution services; its claim presumably would be that Apple's restrictions on the sale of apps to iPhone owners deprive the developer of profits it otherwise could earn as a supplier on an open market. Apple has made itself the only retailer of iPhone apps; the developer's action would be equivalent to a suit by a wholesaler arguing that a retailer has pushed down wholesale prices through the exercise of monopsony (not monopoly) power. Accordingly, the developer's damages would be measured by the amount for which it could have sold its apps in a competitive market, or by the increased sales it could have made at the same prices without Apple's supracompetitive markup. It thus would be seeking a fundamentally different recovery from the iPhone owners, whose damages are measured by the "but-for" retail price of apps in a competitive market. Those two measures are not the same. iPhone owners may well suffer damages even though app developers suffer none or even benefit from the limits Apple imposes on price competition.

2. The iPhone owners' action does not threaten unduly complex damage calculations, as might result from an attempt to allocate damages among different levels of a supply chain. Calculating the owners'

damages from Apple's alleged antitrust violations is no more (and possibly less) complex than calculating an app developer's damages. That is because the developer's damages case would require estimating not only the amount the developer would have received on each sale, but also the amounts it would have received on lost sales it would have made but for Apple's conduct.

B.1. The federal policy favoring private enforcement of antitrust actions – which this Court has stressed as a significant reason for the direct-purchaser rule – favors recognizing the iPhone owners' cause of action. The developers may not even be able, and certainly are not likely, ever to sue Apple under antitrust law. Nor is there any risk of diluting incentives for a private damages action: because iPhone owners deal directly with Apple and suffer the most direct injuries from its conduct, they are the best positioned to seek a monetary remedy.

2. Affirmance here would not call into question cases holding that, when an intermediate seller-agent is completely controlled by its principal so that it is genuinely a mere conduit for sales, its upstream principal is liable to the downstream purchaser for damages. In such a case, however, the upstream principal must at least have an unconstrained ability to set prices and terms. In that circumstance, if the upstream principal bears an input cost that is elevated as the result of an antitrust violation, there may be a dispute about whether and to what extent the principal has passed through that cost in setting the retail price. Apple's arrangement does not meet that description: Apple deprives developers of most pricing discretion, and it is meaningless to ask about pass-through of a cost that the developers never incur.

ARGUMENT

I. iPHONE OWNERS CAN SEEK DAMAGES BECAUSE THEY PURCHASE APPS DIRECTLY FROM APPLE

Section 4 of the Clayton Act permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to sue the violator in district court and to recover treble damages and attorney's fees. 15 U.S.C. § 15(a). As this Court has observed, that statutory text "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

This Court has held, however, that § 4 is not "as broad as its words suggest." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-30 (1983). Instead, the Court has created rules of "antitrust standing" that "determin[e] whether [a particular] plaintiff is a proper party to bring a private antitrust action." *Id.* at 535 n.31. This Court has since clarified that statutory standing is better described as a matter of "whether [a plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue" – or, "[i]n other words, . . . whether [the plaintiff] has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014).

At issue in this case is the holding of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which establishes that the plaintiff who purchases a good or service directly from an antitrust violator – "the overcharged direct purchaser, and not others in the chain of manufacture or distribution" – "is the party 'injured in his business or property' within the meaning of" § 4 of

the Clayton Act. *Id.* at 729. Here, respondents have properly alleged that Apple is a monopolist that sells apps directly to (and imposes an overcharge directly on) respondents. Based on those allegations, respondents can seek damages from Apple. The case can and should be resolved as simply as that.

A. Plaintiffs Who Purchase Directly From An Antitrust Violator Can Seek Damages From That Violator

1. The rule of *Illinois Brick* traces back to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There, in a suit by a shoe manufacturer (Hanover) against an allegedly monopolistic lessor of shoe manufacturing equipment (United), the Court held that United could not defend the claim by asserting a "passing-on defense" – that is, by contending that Hanover was undamaged (or less damaged) because it recovered any unlawful overcharge by passing that charge on to its own customers. *Id.* at 494. The Court instead permitted Hanover to sue for "the full amount of the overcharge," without any reduction for any amount passed on. *Illinois Brick*, 431 U.S. at 730; *see Hanover Shoe*, 392 U.S. at 489 ("[T]he buyer is equally entitled to damages if he raises the price for his own product.").

The *Hanover Shoe* Court gave three reasons for permitting Hanover to recover the entire overcharge on its direct purchases from the antitrust violator. One reason sounded in precedent, and two in policy. The precedential reason was that, dating back at least to *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (Holmes, J.), "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property" within the meaning of the antitrust laws. *Id.* at 396, *quoted*

in Hanover Shoe, 392 U.S. at 490. In *Chattanooga Foundry* and other cases, the Court located the rule that "the possibility that plaintiffs ha[ve] recouped . . . overcharges from their customers [i]s . . . irrelevant in assessing damages." *Hanover Shoe*, 392 U.S. at 490; *see also id.* at 490 n.8 ("'The general tendency of the law, in regard to damages at least, is not to go beyond the first step.'") (quoting *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)).

The policy reasons given for rejecting United's passing-on defense in *Hanover Shoe* included a problem of trial proof and a problem of incentives. The trial-proof problem was that, because of the "wide range of factors [that] influence a company's pricing policies," the "task" of proving that the plaintiff had passed on a specific, quantifiable part of the defendant's overcharge would, the Court believed, "normally prove insurmountable." *Id.* at 492, 493. Yet defendants' attempts to do so would "often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493. The incentive problem was that, if plaintiffs were required to allocate their damages among everyone who paid any part of an overcharge at any point in the stream of commerce, there would be too little incentive for anyone to sue, so that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality." *Id.* at 494.

To avoid those consequences, the Court adhered to the straightforward approach to damages applied in *Chattanooga Foundry*. Under that approach, "Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge." *Id.*

United was not permitted to reduce or eliminate Hanover's damages by arguing that in the absence of United's overcharge Hanover would have "charged less" for shoes and therefore "made no more profit." *Id.* at 487-88.

2. *Illinois Brick* itself was a suit by the State of Illinois and other government entities against manufacturers of concrete blocks. The manufacturers sold the blocks to masonry contractors, which sold the blocks (as part of masonry projects) to general contractors, which sold the blocks (as part of completed construction projects) to Illinois and other customers. 431 U.S. at 726. Illinois alleged that the manufacturers had conspired to fix prices for concrete blocks and that the resulting overcharge was passed along the supply chain from the masons to the general contractors to, eventually, their customers. *Id.* at 726-27, 735. The manufacturers argued that, under *Hanover Shoe*, the action for the full overcharge belonged to the masons (the direct purchasers of the price-fixed product) and indirect purchasers such as Illinois could not recover.

This Court agreed. It first held that *Hanover Shoe* should apply "equally to plaintiffs and defendants – that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser." *Id.* at 729. In support of that approach, the Court reasoned that treating plaintiffs and defendants asymmetrically would create a "serious risk of multiple liability for defendants," with "overlapping recoveries certain to result," *id.* at 730-31; that indirect-purchaser suits would create the same "evidentiary complexities and uncertainties" that the *Hanover Shoe* Court had sought to avoid, *id.* at 731-33; and that

"the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers," *id.* at 733-35.

The Court then rejected Illinois' request to limit or overrule *Hanover Shoe* in order to open the way for indirect-purchaser suits. *Id.* at 736-38. In addition to concerns of *stare decisis*, *id.*, the Court feared that including indirect purchasers in antitrust cases would lead to "massive multiparty litigations" and that "the attempt to trace the effect of the overcharge through each step in the distribution chain" would impede "the effective enforcement of the antitrust laws." *Id.* at 740-41; *see also id.* at 732-33 (highlighting the difficulty of "demonstrati[ng] . . . how much of the overcharge was passed on . . . at each point at which the price-fixed goods changed hands"). In *Illinois Brick* itself, that inquiry would have required estimating successively the overcharges both to the masons and then to the general contractors before determining Illinois' own damages. Nor did the Court wish to engage in "carv[ing] out exceptions to the *Hanover Shoe* rule for particular types of markets" in which the difficulties of proof might be easier. *Id.* at 744-45. To avoid those difficulties, and to further "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws," the Court adhered to *Hanover Shoe*'s rule "elevating direct purchasers to a preferred position as private attorneys general." *Id.* at 745-47.

3. This Court returned to the *Illinois Brick* rule in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), an action by the State of Kansas alleging that suppliers of natural gas had conspired to fix the price of their product. The suppliers had sold the gas to utility companies, which in turn sold it to consumers

(represented by Kansas as *parens patriae*). The suppliers contended that the consumers (like Illinois in *Illinois Brick*) were only indirect purchasers of natural gas and that the action for the entire overcharge belonged exclusively to the utilities. Kansas responded that indirect-purchaser suits should be permitted "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers," because the "concerns in *Hanover Shoe* and *Illinois Brick* about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases." *Id.* at 208. The Court refused to make an "exception," *id.* at 216-17, for public-utility cases.

The Court observed that public-utility regulation did not wholly eliminate the concerns that had motivated the holdings of *Hanover Shoe* and *Illinois Brick* – even under a rate-setting scheme, there still would be problems of apportionment, risks of multiple recovery, and a reduced incentive for the utilities themselves to sue. *See id.* at 208-16. More generally, however, the *Utilicorp* Court reaffirmed its refusal in *Illinois Brick* to make exceptions to the direct-purchaser rule based on economic factors. *See id.* at 217 ("[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.").

Taken together, *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* create a bright-line direct-purchaser rule: those who purchase a product or a service directly from an antitrust violator can sue that violator for damages. *See Utilicorp*, 497 U.S. at 207. Those who are two or more steps from the violator in the "distribution

chain," *id.*, cannot. No further inquiry into the specifics of a case is required or even permitted.

B. iPhone Owners Purchase Apps Directly From Apple And Suffer Damages Caused By Apple

1. iPhone owners purchase apps directly from Apple and are directly harmed by its anticompetitive conduct

a. Under *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*, iPhone owners can recover damages based on claims that they buy apps directly from Apple at unlawfully high prices. There is no allegation that high app prices are passed from Apple to consumers through a "middlem[a]n," *Illinois Brick*, 431 U.S. at 737, or that the owners bought "an illegally monopolized or cartelized product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation," Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1717 (1990); *see Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 482 (7th Cir. 2002) (Wood, J.) (summarizing the *Illinois Brick* "paradigm": "Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C"). The absence of an intermediary here is dispositive.

The complaint alleges that Apple unlawfully monopolized the retail aftermarket for apps and that, within that market, it collects supracompetitive prices from respondents who buy apps from Apple directly. *See, e.g.*, App. 41a-42a (¶ 3: "Apple has engaged in an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of

iPhone apps worldwide"; ¶ 4: "Apple's App Store is the only store in the entire world . . . where the tens of millions of U.S.-based iPhone owners . . . can buy an iPhone app . . . . Consequently, iPhone consumers nationwide have paid [Apple] hundreds of millions of dollars more for iPhone apps than they would have paid in a competitive market."). Apple and the United States concede the same in their briefs. *See* Pet. Br. i (Apple "interacts with and delivers goods 'directly' to consumers"), 18 ("Apple sells and delivers apps to consumers"), 35 ("consumers . . . purchase *apps* from Apple"); *see also* U.S. Br. 24 ("respondents purchased apps directly from Apple"). Those concessions foreclose any claim of a middleman in the supply chain.

The root of *Illinois Brick* is proximate cause – the "tendency of the law . . . in regard to damages . . . not to go beyond the first step." *Southern Pac.*, 245 U.S. at 533, *quoted in Hanover Shoe*, 392 U.S. at 490 n.8. That principle is amply satisfied by allowing consumers to assert a cause of action against a monopolist that has set up a "Store" to obtain their business and that induces them to pay unlawfully high charges. *See* IIA Areeda & Hovenkamp ¶ 345, at 179 (4th ed. 2014) ("[C]onsumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted."). Indeed, Apple deliberately has placed itself as close as possible to iPhone owners at each step of the process that leads to the overcharge: Apple manufactures and sells the iPhone with the App Store already installed; the App Store is the only place where Apple allows the owner to purchase or obtain apps for the iPhone; an owner seeking to obtain an app visits the App Store and contacts Apple through the iPhone and pays Apple for the app through the App Store; and the delivery of the app, along

with any subsequent upgrades or modifications, occurs using Apple's servers. The iPhone owners are not "complain[ing] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts," *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268-69 (1992), as were Illinois and Kansas in their unsuccessful cases.

Without that link to the traditional understanding of proximate cause, there is no justification for this Court to impose a limit on the otherwise plain and broad language of § 4 of the Clayton Act. As *Lexmark* explains, this Court's decisions involving "statutory standing" are ultimately exercises in "apply[ing] traditional principles of statutory construction." 572 U.S. at 128 & n.4. Here, Apple makes no attempt to ground its dramatically revised version of *Illinois Brick* in any "background principle[]" of law, *id.* at 129, that Congress would have recognized when it enacted the Clayton Act. Its brief is instead a thinly veiled invitation for the exercise of "independent policy judgment" to "limit a cause of action that Congress has created." *Id.* at 128. This Court should decline Apple's request.

b. iPhone owners' direct-purchaser relationship with Apple is further confirmed by the Second Circuit's – and Apple's own – treatment of the same issues. *See United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) ("*Apple eBooks*"). That case concerned the iBookstore (later renamed Apple Books), which Apple operated on terms materially indistinguishable from the App Store. Book publishers had "the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission." *Id.* at 303. The *Apple eBooks* court correctly recognized that, even under what it

styled as "an agency relationship," Apple remained the "retailer." *Id.*

The Second Circuit, to be sure, was not applying the direct-purchaser rule. But, in the district court, Apple took the same position when the issue at stake *was* direct-purchaser status. There, a group of consumer plaintiffs (who ultimately settled) initially alleged both Sherman Act direct-purchaser and state-law indirect-purchaser claims. Apple moved to dismiss those claims in the district court. Apple argued that – even if the plaintiffs' indirect-purchaser claims could survive against the publishers that provided the ebook content – those claims should be dismissed against Apple because, "vis-à-vis [Apple]," the consumers "*are direct purchasers.*"[10]

That concession simply recognized the reality of Apple's relationship with the purchasers of the apps and other media it sells. Like any brick-and-mortar retailer, Apple sells consumer goods to consumers by collecting money, processing sales, and paying manufacturers; and it does so in a "store" that it curates, manages, and owns. It also goes to a great deal of trouble to maintain exclusive control over its relationship with iPhone owners because of the massive profits it can earn by doing so. If those profits incorporate prices inflated by anticompetitive conduct, iPhone owners should be able to seek damages from Apple as seller.

c. Under the holding of this Court in *Utilicorp*, there is no need to inquire into whether "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* . . .

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[10] Apple's Mem. of Law in Supp. of Mot. To Dismiss at 25, *In re Electronic Books Antitrust Litig.*, No. 11-md-2293 (DLC), ECF No. 74 (S.D.N.Y. filed Mar. 2, 2012) (emphasis added).

apply with equal force" in this case as in others. 497 U.S. at 216. Although those rationales do indeed favor the iPhone owners, *see infra* Part II, *Utilicorp* teaches that such an inquiry should not be made in each "specific case," because doing so would invite wasteful and burdensome "'litigation over where the line should be drawn,'" sacrificing the benefits of predictability and administrability that the direct-purchaser rule provides. 497 U.S. at 216-17 (quoting *Illinois Brick*, 431 U.S. at 745). That decision to avoid "litigat[ion] [of] a series of exceptions" as an "unwarranted and counterproductive exercise," *id.* at 217, was a compelling reason for this Court to deny a damages action to Kansas – which the Court did not seriously dispute could otherwise have proved significant injuries to its citizens on the facts of that case.

Consistent with that holding, this Court should reject Apple's invitation (at 5) to engage in a free-ranging inquiry into whether this case implicates the same "concerns about pass-through and duplicative recovery evident in each of *Hanover Shoe*, *Illinois Brick*, and *UtiliCorp*." Accepting Apple's invitation to change the direct-purchaser rule would depart from *Utilicorp*'s categorical approach and open the door for courts to create ad hoc rules that would bar even direct purchasers from suing on a case-by-case basis in antitrust litigation around the country. Concerns about the size, complexity, and pace of antitrust litigation are no less pressing now than they were in 1990. Nor would a fact-specific inquiry in this case even provide much guidance for district and circuit courts confronted with other direct-purchaser issues in the future: no other company has created a system structured like Apple's or as finely tuned to extracting

profits by channeling customers' choices through monopolistic control. *See infra* Part II.B.2.

Apple goes so far as to say (at 19) that "[w]ho processes the sale, collects the purchase price, and delivers the goods" – all the ordinary indicia that one would look at to identify a purchase – should "make[] no difference at all," and that courts instead should select plaintiffs based on their view of "pricing dynamics and specifically the difficulty of trying to figure out how the party that first bears an overcharge will adjust its pricing." That sweeping position would deny plaintiffs the right to seek damages whenever a defendant can make the economics of the transaction appear to be complicated. This Court, however, held the opposite in *Illinois Brick* and in *Utilicorp*, where it warned against trying to determine whether a particular pass-on issue was "susceptib[le] of proof in a judicial forum." *Illinois Brick*, 431 U.S. at 744-45, *quoted in Utilicorp*, 497 U.S. at 216. In seeking to deploy such arguments against direct purchasers in this case, Apple bears a heavy burden to demonstrate that the concerns expressed in *Utilicorp* and *Illinois Brick* warrant denying direct purchasers their statutory claim.

2. Apple fails to show that the owners do not directly purchase the monopolized product

In addition to its general argument that this Court should reconfigure *Illinois Brick* as a case-by-case inquiry, Apple gives three principal reasons why – despite its concession that iPhone owners buy apps from Apple – respondents are not direct purchasers of the monopolized product. None is persuasive.

a. Apple attempts (at, *e.g.*, 36) to recast the subject of this case as a monopoly on "distribution services,"

"not . . . apps." The complaint, however, clearly alleges that the relevant market is the "aftermarket for software applications that can be used only on iPhones." *E.g.*, App. 58a (¶ 65). Similar phrasing is used throughout the complaint. *See* App. 41a, 43a, 48a-49a, 56a, 59a-60a (¶¶ 3, 8, 29, 52-53, 66-69). Those allegations govern on review of an order granting a motion to dismiss. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 751 n.2 (2017); Pet. Br. 6. The well-settled principle "that the plaintiff is the master of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987), bars Apple's attempt to seek dismissal based on a revision of respondents' claim that respondents did not plead.

By contrast, the phrase "distribution services" appears nowhere in the operative complaint. As support for its characterization of the complaint, Apple quotes only (at 2, 36) allegations that it "derive[d] supra-competitive profits from the distribution of iPhone apps worldwide" and that it has "cornered 100% of the worldwide distribution market for iPhone applications." App. 41a (¶ 3). Those allegations do not limit the owners' claims to distribution services, but rather define those claims as applying to the aftermarket for iPhone apps at the distribution (that is, retail) level – the level at which Apple sells them. There is nothing unusual about a claim that a market is cartelized or monopolized at the distribution or retail level.[11] If

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[11] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973) (describing successful suit for monopolization of "the retail distribution of electric power"); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 179, 183-84 (1944) (affirming injunction against conspiracy of motion picture exhibitors to monopolize the business of operating movie theaters in certain towns; declining to consider, as "immaterial," whether movie

one company acquired all the gas stations in a metropolitan area, then the price of gas to drivers in that market would rise to supracompetitive levels regardless of whether gasoline producers or wholesalers were competing with one another.

Even if the relevant market here were the market for app-distribution services (which it is not), Apple still would have no support for its assertion (at 34-35) that it provides those distribution services solely to developers and not to iPhone owners. To the contrary, Apple's own Services Terms describe the App Store as a "Service[]" that allows customers to "buy . . . [or] license . . . apps." *See supra* p. 5. Thus, even on Apple's own inaccurate characterization of the transaction, Apple still provides app-distribution services directly to iPhone owners, and iPhone owners pay money directly to Apple. If respondents can prove they pay more as a result of Apple's anticompetitive conduct, then the Clayton Act permits them to recover the resulting damages.

Apple further errs in invoking (at 35) this Court's recent decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*Amex*"), and describing the App Store as a "two-sided platform[]." As this Court explained in *Amex*, a two-sided transaction platform is "best understood as supplying only one product – transactions – which is jointly consumed" by the parties on both sides of the platform. *Id.* at 2286 n.8.[12]

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distributors – the next level of the supply chain – were involved in the conspiracy).

[12] The contrast between a credit card network and the Apple App Store is stark. A credit card network is indifferent to the nature of the purchase and sale that gives rise to a financial transaction, and the service provided is the purely financial one of enabling payment – whether for "a chair, a milk can, or eight

The Apple Store is not a "transaction platform" but a retail operation selling apps; the fact that Apple collects payment from customers and renders payment to suppliers does not make it a two-sided transaction platform any more than a corner grocery, which does the same thing. Moreover, even if the App Store were appropriately classified as a two-sided transaction platform, Apple would be selling transactions (not apps and not app-distribution services) simultaneously to developers and iPhone owners. As *amicus* Verizon notes (at 9-11), the interaction of such a classification with the direct-purchaser rule is not at all clear. There is no need to use such a complex model where Apple has set up a "Store" that purposefully emulates a traditional retailer.

b. Apple also errs in claiming (at 19) that, when selling apps to iPhone owners, it is not acting on its own behalf but is merely a "sales agent[] . . . follow[ing] [its] principals' instructions as to what price to charge," and in comparing itself (at 37) to a "travel agent 'sell[ing]' airline tickets (for airlines)." To begin with, the general definition of an agent is one that "act[s] on the principal's behalf and subject to the principal's control." Restatement (Third) of Agency § 1.01 (2006); *see* IIA Areeda & Hovenkamp ¶ 346f, at 194 (where the ultimate seller controls the intermediate seller, the plaintiff is considered to purchase directly from the ultimate seller for *Illinois Brick* purposes). Here, Apple is in control – it offers take-it-or-leave-it terms to both developers and iPhone owners, reserving

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volumes of Gibbon." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 399 (1999) (Souter, J., concurring in part and dissenting in part). By contrast, Apple carefully controls the products offered through its App Store as well as limits the prices charged for them to even dollar amounts (less a penny).

the right to change those terms unilaterally at any time. If Apple's contention that it is a sales agent in the relevant sense of being controlled by the developers is even plausible, it at best points to a factual dispute that should not be resolved in Apple's favor on a motion to dismiss.

Similarly, Apple's repeated contention (at, *e.g.*, 35) that developers set the prices for apps is partly untrue and partly misleading. The contention is untrue because, as Apple admits (at 9), Apple restricts developers' pricing choices to prices "ending in 99 cents," effectively ruling out 99% of possible prices, reducing price competition among developers, and shoring up prices in the App Store. It is hard to imagine a travel agent telling competing airlines that all ticket prices must "end in 99 dollars" – unless, of course, the travel agent had somehow acquired exclusive rights to sell airline tickets to an entire market of valuable customers, in which case it could call the shots much as Apple is doing now.

Apple's pricing contention also is misleading because, although app developers now can choose any price ending in 99 cents, that choice is given to them by Apple, and Apple has the technological ability and contractual right to change it at any time. If Apple decided tomorrow to alter its agreement with developers and freeze App Store prices at their current levels – or at half those levels, or at double them – neither iPhone owners nor developers could do anything about it except for ceasing to use the App Store. Apple's decision for now to allow developers a limited choice in establishing pricing for apps as part of Apple's own profit-maximizing strategy should not enable it to claim that developers are the ones in control.

More generally, Apple's insertion of agency language in its contracts should not alter the antitrust analysis; it does not affect the directness of the purchase of apps by iPhone owners from Apple itself or the substance of the transactions either between Apple and the developers or between Apple and the iPhone owners. *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010) (explaining that, in antitrust, this Court has "eschewed . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate"); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) (refusing to permit "legality for antitrust purposes [to] turn on clever draftsmanship"). The same is true of Apple's language stating that there is a "sales contract" between the iPhone owner and the developer to which Apple is "not a party." Apple Services Terms § G. That language means little; the Apple Services Terms themselves obligate the iPhone owner to pay Apple – not the developer – for the app,[13] and they give Apple the right to enforce the terms of the app's license agreement just as the developer could.[14]

That point is further illuminated by the leading antitrust treatise, which addresses the specific hypothetical that Apple invokes – travel agents selling

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[13] *See* Apple Services Terms § B ("Apple will charge your payment method (such as your credit card . . .) for any paid Transactions . . . . If we cannot charge your payment method for any reason . . . , you remain responsible for any uncollected amounts . . . ."); *see also* App. 52a (¶ 41) (alleging that "Apple sells the apps" and "collects the entire purchase price").

[14] *See* Apple Services Terms § G ("You acknowledge and agree that Apple is a third-party beneficiary of the [end-user license agreement] applicable to each Third Party App and may therefore enforce such agreement.").

airline tickets – and concludes that, for purposes of the *Illinois Brick* rule, the agent acts as a purchaser-reseller even though for purposes of contract and property law it may act as a broker and never own the tickets. *See* IIA Areeda & Hovenkamp ¶ 345, at 183-84 (arguing that, "if one travel agency deals in traditional brokerage arrangements for flights to the Superbowl while another buys tickets in a large block and resells them," both agencies are engaged "in the sale of Superbowl travel notwithstanding the different characterizations of their vertical transactions").[15] The treatise draws the conclusion that a broker can sue a combination of upstream suppliers, just as a purchaser-reseller could. The same reasoning shows equally that consumers can seek damages from a cartel of brokers (or "sales agents"), just as they could from a monopolizing reseller, if those brokers use their market power to increase the price of tickets.

c. Apple sought review in this Court primarily on the strength of the Eighth Circuit's decision in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), and now defends that decision only briefly (at 6, 38-39). *Ticketmaster*'s flawed reasoning and incorrect result underscore the defects in Apple's position.

In *Ticketmaster*, plaintiff concertgoers sued Ticketmaster for "monopolizing, or attempting to monopolize, the market for ticket distribution services" and for "engaging in price fixing with various concert venues and promoters." 140 F.3d at 1168. Ticketmaster had a monopoly on ticket distribution, the complaint

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[15] *See also* IIA Areeda & Hovenkamp ¶ 345, at 183 ("Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers.").

alleged, because it had entered "long-term exclusive contracts with almost every promoter of concerts in the United States," giving Ticketmaster the exclusive "right to handle the vast majority of ticket sales for almost every large-scale popular music concert in the United States." *Id.* The concertgoers alleged that Ticketmaster used that market control "to extract . . . supracompetitive fees for ticket distribution services." *Id.* at 1169.

The Eighth Circuit believed that this Court's indirect-purchaser cases support the proposition that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." *Id.* Applying that approach, the majority reasoned that the plaintiff concertgoers were indirect purchasers because their "inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so." *Id.* at 1171 (emphasis added). Put differently, "ticket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." *Id.*

Ticketmaster's antecedent-transaction test is not consistent with the line this Court drew in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*. Those cases tie statutory authorization to seek damages to the far simpler and more administrable concept of a direct purchase. Moreover, the Eighth Circuit's reasoning led it to a strange and incorrect result: even though ticket buyers paid "distinct service and convenience fees" "directly to Ticketmaster," those buyers were barred from recovering any overcharge that Ticket-master was in a position to impose only because concert venues had agreed to use Ticketmaster's

services first. 140 F.3d at 1171. The court of appeals' speculation that concert venues may have charged less for underlying tickets to account for the charges that concert goers had to pay Ticketmaster to avoid a trip to the venue box office, *see id.* at 1171-72, turns *Illinois Brick* on its head: instead of a bright-line rule confirming direct-purchaser suits, the *Ticketmaster* approach denies direct purchasers the right to bring suit based on an amorphous, speculative standard.

In any event, even *Ticketmaster*'s test would identify iPhone owners as the market participants whom Apple exploited to create a monopoly by selling them "closed" iPhones. Here, the earlier transaction that creates the preconditions for monopoly pricing is Apple's sale of iPhones to iPhone owners, coupled with technological barriers that "prevent iPhone consumers from installing and running apps that were not sold or approved by Apple." App. 45a, 49a (¶¶ 14, 30). Without the transaction between Apple and the iPhone purchaser, any deal between Apple and the app developer is economically irrelevant from the consumer's perspective.[16] Just as concertgoers came to Ticketmaster because it already had locked up the concert venues, the developers here came to the App Store because Apple already had constrained iPhone owners into App-Store-only purchasing.

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[16] It also is economically irrelevant from the app developer's perspective, because the developer cannot supply an app for Apple to sell through the App Store for use on an iPhone until Apple sells that device to a customer.

II. THE POLICY CONCERNS THAT UNDERLIE *ILLINOIS BRICK* SUPPORT THE iPHONE OWNERS' RIGHT TO SEEK DAMAGES

The conclusion that the direct-purchaser rule authorizes respondents' action is reinforced by the policy concerns that underlie that precedent. iPhone owners are direct purchasers of apps from Apple and are damaged by higher prices caused by Apple's anti-competitive conduct. Contrary to Apple's arguments, there is no alternative direct purchaser in a position to sue (and thus double recovery is not a concern) because app developers are suppliers to Apple – of apps that Apple sells through its App Store – not "direct purchasers of distribution services" as Apple (at 16) and its *amici* assert. Even if Apple's characterization were accepted, it would not change the result, because the measure of harm that purchasers and developers respectively suffer does not overlap. And, finally, a damages action for iPhone owners helps to vindicate the deeply rooted policy in favor of private antitrust enforcement, without endangering other technology platforms that do not engage in monopolistic conduct.

To be clear, a virtue of the *Illinois Brick* direct-purchaser rule is that it is not a multi-factor balancing test, and it eliminates the need to weigh such considerations before a claim for damages may proceed. *See Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law."). Apple could not have doubted that it would have to defend against damages claims asserted by purchasers from the Apple App Store, as it effectively conceded in the *Apple eBooks* case. In any event, policy considerations undermine any possible argument that the Court should make a new exception to *Illinois Brick* here.

A. The iPhone Owners' Action Does Not Threaten Overlapping Or Duplicative Recovery

1. This Court rejected the defensive use of a pass-on theory in *Hanover Shoe* and the offensive use of such a theory in *Illinois Brick* in part because, given overlapping damages among different levels of purchasers, a defendant would face duplicative recoveries if all levels were permitted to sue. *See Hanover Shoe*, 392 U.S. at 492-94; *Illinois Brick*, 431 U.S. at 730-33; *see McCready*, 457 U.S. at 474-75 (explaining that *Illinois Brick* sought to avoid "the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws").

That risk is not present here. If the iPhone owners prevail, they will be entitled to the full amount of the unlawful overcharge that they paid to Apple. That overcharge is the difference between the price the device owners paid Apple for an app they bought from it in the monopolized retail market and the price of the same or an equivalent app in a hypothetical competitive market – one in which owners could purchase either directly from app developers without going through the App Store or from alternative distributors that might offer discounts to attract business away from Apple. *See Chattanooga Foundry*, 203 U.S. at 396 (affirming Sherman Act damages verdict "for the difference between the price paid and the market or fair price that the [plaintiff] would have had to pay under natural conditions"); App. 53a-56a (¶¶ 45-53) (describing the differences between the actual market and a competitive one). That overcharge has not been passed on by anyone to anyone. No part of the iPhone owners' recovery would belong to any other party.

Apple contends (at, *e.g.*, 31) that the only proper plaintiffs would be app developers. But even assuming that a developer could sue,[17] any damages from its lawsuit would be categorically different from iPhone owners'. As a supplier of apps, rather than a purchaser of apps, a developer's damages would be the difference between (1) the profits the developer would have earned selling its apps in a hypothetical market in which iPhone owners are free to purchase apps from the seller of their choice and (2) the profits the developer actually earned through the App Store. Thus, the vendor would be suing Apple for acting – in substance, if not in form – as a monopsonist (sole buyer) of iPhone apps, rather than as a monopolist (sole seller) of such apps. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321-22 (2007) (noting the "close theoretical connection between monopoly and monopsony" and the "similar legal standards" that apply to the two).

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[17] Apple would have a substantial argument that the app developers could not sue because Apple's market power over them stemmed from a voluntary contractual agreement between the developers and Apple that the developers would sell apps to iPhone owners only through Apple's App Store. *See Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1048 (9th Cir. 2008) (allegations of market power are insufficient if they "rest[] on market power that arises solely from contractual rights . . . knowingly and voluntarily g[iven] to the defendant") (citing, among other cases, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 440-41 (3d Cir. 1997)). Respondents made this point in their brief in opposition (at 12-13), and Apple does not respond to or contest it. If Apple could establish both that iPhone owners are indirect purchasers of its services and that developers that directly purchase its services voluntarily agreed to the contractual rights that give it market power, then its contracts successfully would immunize the App Store from antitrust damages liability to any private plaintiff.

So understood, an app developer's damages would not duplicate or overlap with respondents' damages. Indeed, the developer's damages might be positive, zero, or negative – some developers may benefit from Apple's control over the market, especially because Apple's 99-cent rule impedes price competition among developers. For example, without the 99-cent rule, competition from other developers might force the retail price for a particular app to 49 cents per app purchase rather than 99 cents. On a per-app basis, that drop (and the resulting diminution in the amount the app's developer would receive as its wholesale price) would outweigh the effect of any decrease in Apple's 30% markup. And, although the developer might sell more apps at the lower price, it still might lose revenues overall, so that it would be worse off. Regardless, any damages suffered by the developer would be distinct from the iPhone owners' damages based on the supracompetitive retail prices those owners pay Apple.[18]

The possibility that Apple's retail monopoly provides app developers higher revenues and profits than they would earn in a competitive market – while simultaneously harming iPhone owners through higher retail prices – clearly shows that this case is not the kind of indirect-purchaser scenario where *Illinois Brick* bars damages claims. In a true indirect-purchaser situation, the indirect purchaser suffers an overcharge because the direct purchaser itself has suffered an

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[18] Apple quotes (at 33) respondents' statement in their brief in opposition (at 12) that the app developers' damages would be "a piece of the same 30% pie" as respondents'. That statement accepted Apple's premise that the developers would conceive their suit as a suit for app-distribution services. But the developers would not have to adopt that concept, and there is little reason other than Apple's say-so to believe they would.

overcharge and passed it on to the indirect purchaser. The indirect purchaser's damage claims thus depend on the direct purchaser having damage claims of its own. A consumer suing a middleman retailer, however, can certainly suffer an overcharge even though the retailer's wholesalers might have zero or negative antitrust damages.

In any event, it should not be surprising that Apple – as the operator of a monopoly "Store" where it exercises market power on both the buy side and the sell side – at least theoretically might face antitrust liability from more than one source. *See Weyerhaeuser*, 549 U.S. at 321 n.2 (explaining circumstances under which a monopsonistic firm's predatory strategy in its input market might be justified by an opportunity to earn monopolistic profits in its output market); *American Tobacco Co. v. United States*, 328 U.S. 781, 791-93 (1946) (affirming Sherman Act convictions where jury found "dominance and control by petitioners in recent years over purchases of the raw material *and* over the sale of the finished product in the form of cigarettes") (emphasis added); *see also Loeb*, 306 F.3d at 481 ("[D]ifferent injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus . . . differently situated plaintiffs might be able to raise claims."). The direct-purchaser rule does not address that kind of multiple liability, which is unrelated to passing on damages "along a chain of distribution." *McCready*, 457 U.S. at 474-75.

Apple might respond to an app developer's action seeking damages by arguing (as it has here) that it does not buy apps from developers, but merely sells them distribution services and acts as their sales agent in selling their apps to iPhone owners. But the developers could well reply (as respondents argue here)

that Apple's self-serving contract language cannot override economic reality in an antitrust analysis. *See supra* pp. 34-35 (citing *American Needle*, 560 U.S. at 191; IIA Areeda & Hovenkamp ¶ 345, at 183). As the owner-operator of the only "Store" where iPhone owners buy apps, Apple has adopted the role of a retailer, functionally buying from developers as wholesalers and selling to iPhone owners as consumers.

Indeed, any wholesale-retail arrangement "could be written as a brokerage agreement," allocating risk and other economic characteristics "in any way the parties please." IIA Areeda & Hovenkamp ¶ 345, at 183. Any retailer (or combination of retailers) that dominates a local or regional market could, in addition to exercising its market power over prices, require wholesalers needing access to that market to sign a contract appointing it as a "sales agent" or "broker"; providing that it would sell "on consignment"; or, as here, setting itself up as a provider of "distribution services." So long as the retailer has market power to affect prices on both sides, such "bit[s] of formalism," *id.*, do not and should not matter. *Cf. Simpson*, 377 U.S. at 21-22 (refusing to recognize for antitrust purposes a "consignment" arrangement that permitted a gasoline company to "administer[] prices on a vast scale" at the retail level). Where, as here, the putative retailer-agent is clearly a "distinct economic entit[y]" from its nominal principal, *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1031 n.5 (2d Cir. 1979), courts should treat it like any other retailer – as buying from its wholesalers and selling to its customers.[19]

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[19] *Fuchs Sugars* addressed whether a broker was acting as an agent of a sugar refiner for purposes of determining whether the refiner and the broker could conspire under § 1 of the Sherman Act. *See* 602 F.2d at 1030-31; *see also American Needle*, 560 U.S.

Apple also might argue that the app developers cannot complain of monopsonistic pricing because (as it asserts in its brief here at 40) it permits them to "set their own app prices." But the developers would reply that for the vast majority of paid apps – which, from the iPhone owner's perspective, cluster at the 99-cent mark, *supra* p. 7 – Apple's 99-cent rule functionally sets the developer's price at 69.3 cents. Apple forbids a lower (non-zero) price, and the market will not bear a higher one because "[u]sers expect simple apps to be either free or 99 cents."[20] In a competitive market, the developer might expect to make more money either from a higher price per app (for example, 90 cents per sale from a retailer that still charged iPhone owners 99 cents) or from more sales at a lower price (for example, 70 cents per sale on a larger number of app sales from a retailer that charged iPhone owners

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at 194 n.5 (noting that this question is governed by "substance, not form"). That approach is instructive here because the question whether an agent is a distinct economic entity is largely if not entirely congruent with the question whether "the purchase . . . through [the agent] was in all respects a purchase directly from" its principal. *Fuchs Sugars*, 602 F.2d at 1031 n.5 (considering the agent's "function[s]," its control over "price and terms," and its role in the "vertical distribution of the . . . product"); *see also Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1316 (8th Cir. 1986) (considering whether agent "function[s] as an integral part of the corporate entity, represent[s] no separate step in the distribution chain, act[s] for the corporate principal's benefit and [is] functionally indistinguishable from [an] employee[]"); *Holter v. Moore & Co.*, 702 F.2d 854, 856 (10th Cir. 1983) ("[T]he inquiry . . . centers on the independence of the allegedly conspiring actors."). Apple, which created the App Store for its own benefit, which acts in its own interest, and which has and exercises substantial control over the pricing and terms of transactions with iPhone owners, would not meet any of the variations on this test.

[20] Nick Babich, *How To Determine the Right Price For Your Mobile App*, Medium (Feb. 7, 2016), https://medium.com/@101/how-to-determine-the-right-price-for-your-mobile-app-88b266d64ea0.

only 77 cents). Either way, the app developers and the iPhone owners would be seeking to recover for "different injuries in distinct markets," *Loeb*, 306 F.3d at 481, not twice for the same injury.

2. Another reason given by the Court for its rulings in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* was that it would be difficult to determine how intermediate sellers would set their prices if the overcharge had not been imposed. By "concentrating the full recovery for the overcharge in the direct purchasers," *Illinois Brick*, 421 U.S. at 733-35, the Court sought to avoid that calculation. Apple argues (at 40) that the same concern is present here because of the "complexity and uncertainty of estimating . . . pricing decisions," which it erroneously claims are made solely by developers. But any action brought by the developers would require damages calculations at least as complex as those implicated in this case, because there is no reason to believe that in a competitive market prices would conform to Apple's 99-cent stricture.

The app developer's damages case also would be further complicated by the need to estimate the volume of sales in a competitive market. Because the developer could argue that it would have sold more apps by selling to a retailer whose price to iPhone owners was lower, it would be entitled to recover for such lost sales. Thus, the developer's case might well require calculation of both the wholesale and the retail prices and sales figures in the competitive "but-for" world.

To be sure, the market conditions affecting purchase and supply of apps may pose complexities of proof that the calculation of overcharges by the building-supply cartel in *Illinois Brick* did not. But that complexity does not result from allocating a single pot of damages along a distribution chain. Any complexity cannot be

eliminated – let alone eliminated on a principled basis – through Apple's approach of denying direct purchasers their right to seek damages under the Clayton Act.

B. The iPhone Owners' Action Is Consistent With The Proper Role Of Effective Private Enforcement

1. This Court consistently has emphasized that "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Accordingly, each time the Court has addressed the indirect-purchaser rule, it has taken care to protect § 4's private-enforcement mechanism. *See Utilicorp*, 497 U.S. at 214 ("We have maintained, throughout our cases, that our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws."); *Illinois Brick*, 431 U.S. at 737; *Hanover Shoe*, 392 U.S. at 494; *see also* IIA Areeda & Hovenkamp ¶ 346e, at 194 (explaining that the *Illinois Brick* rule is grounded on "the belief that simplified administration improves antitrust enforcement"). Congress's protection of private enforcement would be thwarted here if Apple were allowed to prevail. iPhone owners, unlike app developers, directly bear the supracompetitive prices and have the appropriate incentives to enforce the antitrust laws. Apple's rule, by contrast, would immunize it from damages liability in private suits.

It is not clear that app developers have an incentive or an ability to sue. If they have an incentive to sue, it is because the developers are being underpaid and not because iPhone owners are being overcharged. *See supra* pp. 40-42, 44-45. Yet even that incentive may not be present: Apple's anticompetitive practices doubtless benefit at least some developers, which will have no reason or basis to sue. And even developers

that believe they are making less than they would in a market free of Apple's retail monopoly may be deterred by the knowledge that Apple has the contractual right to remove their apps from the App Store at any time and for any reason, if it deems such action "prudent." *See supra* p. 8. An app developer that sued Apple and had its app removed from the App Store during the pendency of the lawsuit likely would be ruined financially before the suit was resolved.[21]

Looking at the matter from the other end, the specific concerns about incentives to bringing private actions that the Court raised in its earlier decisions are absent here. Where a business that is a direct purchaser from the monopolist is able to maintain a private enforcement action, such as the shoe manufacturer in *Hanover Shoe* or the masons in *Illinois Brick*, a rule spreading damages across the supply chain may decrease that potential plaintiff's incentive to sue. Where, as here, the monopolist deals with and sells directly to consumers, consumers have the same incentive – the damages available to motivate private enforcement are not dispersed among multiple purchasers in a chain.

2. Private actions based on the kind of theory that respondents advance here also will focus on cases where enforcement is needed – which, based on

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[21] The Court noted in *Illinois Brick* that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers," 431 U.S. at 746, and acknowledged that such a concern weighed against the direct-purchaser rule, but found it insufficient "on balance" to outweigh other concerns that moved the Court, *id.* Here, where the direct-purchaser rule supports respondents, *see supra* Part I, the concern that developers may be deterred from enforcing the antitrust laws provides an additional reason to apply that rule as the Court has articulated it.

the current state of the industry, will be few but important. Apple complains (at 44) that the Ninth Circuit's holding "will consistently result in the wrong answer when the distributor is an agent rather than a price-setting retailer." As we have shown, Apple is not an agent in the relevant sense. Respondents seek a rule that would hold online retailers to account if the retailers, themselves, engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is what antitrust is for.

Nor would respondents' rule affect the correct treatment of situations where an online (or offline) intermediary acts as a true agent of a seller – acting in the seller's interest and subject to the seller's control over the pricing and terms of transactions. In that situation, there "effectively has been only one sale," and so the purchaser from the intermediary can seek damages from the principal. *Jewish Hosp. Ass'n of Louisville, Kentucky, Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980); *see* IIA Areeda & Hovenkamp ¶ 346f, at 195 (arguing for this result where there is "'functional economic or other unity' of violator and direct purchaser" or where the violator "effectively controls the direct purchaser"). That is a very different case from this one, where Apple's interests are not necessarily aligned with those of the app developers and Apple is certainly not subject to their control.

Apple's parade of horribles in the form of supposed widespread industry liability lacks merit. Apple lists six online marketplaces that it incorrectly claims (at 45) are "the same as, or similar to," the App Store. Those marketplaces are Google Play, Ticketmaster, StubHub, eBay, Sears Marketplace, and Facebook Marketplace. Apple makes no attempt beyond assertion to show that any of those platforms engages in

monopolistic lock-in practices similar to Apple's. To the extent those companies bring together buyers and sellers without exerting control over the pricing or terms of their transactions, they likely would not be exposed to the type of action respondents have brought here – not so much because of the direct-purchaser rule as because (unlike Apple) they actually would not be monopolizing any product they sold.

a. Google's "Google Play" store offers users of Android devices access to apps that run on that operating system. While Google Play may well dominate that market, allegations that it obtained market power through anticompetitive actions would be harder to frame, because Android users can purchase – and Android developers can sell – apps from "sources other than Google Play."[22] In addition, consumers can access Google Play and the other sources from which apps may be purchased from a wide range of devices (but not, of course, the iPhone). The vast majority of those devices are not designed or sold by Google.[23] Google thus does not lock its customers into a "closed" system requiring them to shop in an aftermarket Google has monopolized, as Apple restricts iPhone owners to the App Store.

b. eBay, Sears, and Facebook provide platforms for selling general goods over the web, while StubHub hosts a similar web-based marketplace for reselling

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[22] Android Developers, *User opt-in for installing unknown apps*, https://developer.android.com/distribute/marketing-tools/alternative-distribution#unknown-sources (last visited Sept. 24, 2018).

[23] *See* Dan Frommer & Rani Molla, *The Pixel market share chart Google probably won't be showing at its event today*, recode (Oct. 4, 2017), https://www.recode.net/2017/10/4/16418170/google-pixel-market-share-2017-event-chart-data.

tickets to popular events.[24] None of the four prevents buyers and sellers from freely transacting in any other marketplace, simultaneously or alternatively. Because those marketplaces sell general goods, consumers can shop for the same good (say, a baseball signed by a famous player) on multiple sites at once. Those marketplaces thus compete on a variety of dimensions, which acts as a check on onerous terms.[25] Indeed, for most of the goods sold on those platforms, a brick-and-mortar store permits consumers to purchase without a computer or smartphone.

StubHub explicitly allows sellers "to list [their] tickets on StubHub and on other sites," provided that, if the tickets sell elsewhere, the seller "delete[s] them from StubHub immediately."[26] StubHub thus expects both buyers and sellers to shop for the best prices, selection, or services, and it competes for business on that basis.

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[24] *See, e.g.*, Facebook Help Center, *About Marketplace* ("People and businesses can use Marketplace to buy and sell items on Facebook."), https://www.facebook.com/help/1713241952104830/?helpref=hc_fnav (last visited Sept. 24, 2018); StubHub, *About us* (StubHub "enable[s] experience-seekers to buy and sell tickets whenever and wherever they are through our desktop and mobile experiences"), https://www.stubhub.com/about-us (last visited Sept. 24, 2018).

[25] *See, e.g.*, ebay Customer Service, *Get help with an item that hasn't arrived* (explaining that, if issue cannot be resolved through the seller, "we're always ready to step in and help"), https://www.ebay.com/help/buying/returns-refunds/get-help-item-hasnt-arrived?id=4042&st=7 (last visited Sept. 24, 2018); StubHub, *FanProtect Guarantee* ("StubHub backs every qualified order so you can buy and sell with 100% confidence."), https://www.stubhub.com/legal/?section=fp (last visited Sept. 24, 2018).

[26] StubHub, *Seller Policies* § 2.9, https://www.stubhub.com/legal/?section=sp (last visited Sept. 24, 2018).

Moreover, because these four marketplaces are web-based, there is no equivalent to Apple's device-based lock-in. Any consumer with an Internet connection and a web browser can shop (or sell) on any of those four platforms.

c. Ticketmaster, the subject of the *Ticketmaster* case, sells primary-market (new) tickets to events sold by the event venue. On the seller-side, Ticketmaster enters "long-term exclusive contracts" with concert promoters and venues that grant it the exclusive right to sell new (not re-sold) tickets to those events. *Ticketmaster*, 140 F.3d at 1168. However, even Ticketmaster faces competition in several ways Apple does not.

First, *buyers* are free to pursue secondary market (resale) tickets from sites like StubHub, Craigslist, Facebook Marketplace, or eBay. The existence of those platforms provides some measure of substitutability and constrains Ticketmaster and its venues from imposing monopoly prices. There is no secondary market for iPhone apps.

Second, Ticketmaster's exclusive contracts are term-limited, and other ticket-selling platforms compete for Ticketmaster's business on the usual dimensions of price and quality of service. For example, one rival, Ticketfly, "differentiates itself with its lower fees and social capabilities."[27] As of five years ago, Ticketfly had "stolen some 100 clients, including the Preakness Stakes, The Roxy on L.A.'s Sunset Strip, and New York venues such as the Bell House and Brooklyn Bowl."[28] That, of course, is impossible with the iPhone.

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[27] Daniel Roberts, *Taking down Ticketmaster*, Fortune (Nov. 27, 2013), http://fortune.com/2013/11/26/taking-down-ticketmaster/.

[28] *Id.*

The App Store is not subject to that sort of competition because it is the exclusive point of access to captive iPhone owners – not through exclusive, renewed contracts into which those owners voluntarily entered, but because Apple has locked consumers into Apple's "closed" system. App. 49a (¶ 30). Apple, compared to its peers, thus faces a unique risk of liability under the antitrust laws for the egregiously anticompetitive tactics in which it has engaged. Because only iPhone owners have the injury, incentive, and direct-purchasing relationship with Apple to complain about those monopolistic abuses, they satisfy the *Illinois Brick* rule. That is not "the wrong answer" (Apple Br. 44); that is how the system is supposed to work.

* * *

Regardless of this Court's disposition of the question presented, respondents' claims for injunctive relief are unaffected. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399 (3d Cir. 2000) ("Indirect purchaser status . . . is not fatal to a plaintiff's request for injunctive relief under section 16 of the Clayton Act."). Respondents argued this point in the court of appeals, *see* Resp. C.A. Br. 53-54, but that court did not reach it. It is outside the question presented, *see* Pet. i (seeking review of respondents' right to "sue for antitrust damages"), and if necessary should be dealt with on remand, *see* U.S. Br. 18 n.4 (noting that this issue "will remain open on remand" if Apple prevails).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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